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# POSTEMPLOYMENT COVENANTS NOT TO COMPETE IN SOUTH CAROLINA: WIZARDS AND DRAGONS IN THE KINGDOM

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## I. INTRODUCTION

Consistent reasoning and predictability, touchstones of sound jurisprudence, have been lost in South Carolina case law concerning covenants not to compete in employment agreements.[1] In this area, lawyers may be compared to alchemists in their attempts to create enforceable contracts based on mercurial common-law elements.[2] This Article is intended to help lawyers return to a true and established science as draftsmen and advocates, while affording judges the freedom they need to do real justice.

An analysis of the relatively few South Carolina cases that have considered employee competition covenants reveals that the courts have adopted archaic rules and guidelines to define "reasonableness." Furthermore, the courts' rote application and strict adherence to these rules divert attention from the very public policy fundamentals they purport to protect. The incantation of the rules becomes the message, rather than the medium. This state of affairs suggests that the public interest in the fifteenth century[3] to protect employees from their overlords is still the public interest in South Carolina today. Judicial decisions in this area continue to burden businesses with outmoded presumptions that are both anachronistic and defiant of sound contract

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1. This Article will focus on postemployment restraints or covenants contained in employment agreements and in other agreements between an employee and his employer that restrict the employee's ability to compete with his employer. We will refer to these covenants, whether made in connection with an actual promise of definite-term employment or not, as "employee competition covenants." We recognize that this may be an awkward bending of traditional nomenclature, but we believe a new taxonomy is necessary to ensure proper focus in this area, which is frequently confused with jurisprudence relating to other applications of covenants not to compete.

2. The problem is not peculiar to South Carolina, and the authors do not intend any inference to the contrary. Indeed, at least one judge in a neighboring state remarked: "Ten Philadelphia lawyers could not draft an employer-employee restrictive covenant agreement that would pass muster under recent rulings of [the Georgia Supreme Court]." Fuller v. Kolb, 238 Ga. 602, 605, 234 S.E.2d 517, 518 (1977) (Jordan, J., dissenting). To compare the state of affairs in Georgia as of several years ago, see STATE B. OF GA., CORP. & BANKING L. SEC., WHITE PAPER ON COVENANTS NOT TO COMPETE AND RELATED COVENANTS UNDER GEORGIA LAW: PROPOSALS FOR REFORM (1984) [hereinafter WHITE PAPER].

3. A comprehensive discussion of the historical evolution of employee competition covenants is found in Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960). This Article will summarize highlights of that evolution. *See infra* notes 8-30 and accompanying text. *See also* Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703 (1985) (development of the law governing postemployment restraint agreements and an examination of the justifications offered for disparate treatment of these agreements). For a South Carolina case that discusses the history in this area, see Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961).

principles.[4] It appears, however, that employee competition covenants are the only postemployment restraints[5] treated with this presumptive disfavor.[6] An understanding of the historical and contemporary basis for this attitude mandates a re-evaluation of public policy in South Carolina and yields a useful paradigm to analyze cases that address employee competition covenants.

This Article will examine the evolution of jurisprudence that surrounds employee competition covenants. It also will examine the public policy considerations of these covenants that led early English and American courts to abandon otherwise sacrosanct principles of freedom of contract.[7] Next, we will engage in a critical analysis of the five-part test currently used by South Carolina courts to enforce or strike down employee competition covenants. We will then distinguish the courts' approach toward employee competition covenants from the approach used with respect to other postemployment covenants, including those contained in contracts for the sale of a business. Finally, in light of modern public policy considerations and fundamental contract law, we recommend that the courts abandon the five-part test and begin to use a two-stage protocol based on contract law and a reasonableness test.

We anticipate that the adherence to a simpler, contract-based

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4. For a discussion of this problem with respect to restrictive covenants in general, see Handler & Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U.L. REV. 669 (1982).

5. Other postemployment covenants typically contained in employer-employee agreements restrict the employee's ability to solicit or engage his former employer's customers or employees or to disclose or use that employer's confidential information or trade secrets. These other covenants will provide a basis for comparison and contrast in this Article. *See generally* Kaddis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944) (discussing the distinction between employee competition covenants and other postemployment restraints); *see also infra* notes 109-31 and accompanying text.

6. It is not clear in employee competition covenant cases in South Carolina whether an actual burden of proof rests on the employer to show that the covenant is reasonable and thus enforceable. The cases clearly adopt that approach, however, if only in spirit. *See* Oxman v. Sherman, 239 S.C. 218, 224, 122 S.E.2d 559, 561 (1961) (citing Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685 (1952)). "A restrictive covenant not to compete ancillary to a contract of employment is . . . critically examined and construed strictly against the employer." *Id.*; *see also* Delmar Studios v. Kinsey, 233 S.C. 313, 319, 104 S.E.2d 338, 341 (1958) (applying North Carolina law, which expressly places the burden on the employer to establish reasonableness of an employee competition covenant).

7. For a general discussion of the notion that competent parties should have the freedom to contract, see 1 A. CORBIN, CORBIN ON CONTRACTS § 127 (1963) (courts will refuse to inquire into the adequacy of consideration and will enforce contracts as written, unless fraud, mistake or undue influence can be shown). For cases that discuss this notion in the context of employee competition covenants, see Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc., 410 F. Supp. 967 (D.S.C. 1976); Almers v. South Carolina Nat'l Bank, 265 S.C. 48, 217 S.E.2d 135 (1975).

analysis will engender the predictability that this area of case law lacks. It will help lawyers to draft enforceable employee competition covenants and will also help to align employee competition covenant cases with fundamental contract principles and modern public policies.

## II. EARLY ENGLISH CASE LAW

A general understanding of the historical development of judicial attitudes toward employee competition covenants is a necessary foundation to articulate what the public policy toward those covenants is, and should be, in the 1990s. This discussion also assists in diagnosing why courts have difficulty rendering rational decisions. The historical development suggests that the current approach of South Carolina courts is a vestige of another era.

The first reported case to consider an agreement not to engage in a trade is *Dyer's Case*,[8] decided in 1414. That court found a writ of debt per se illegal that, according to the indenture undertaken by the defendant, would lose its force if the defendant did not practice his trade for a period of six months in the plaintiff's town.[9] Judge Hull exclaimed "[b]y God, if the plaintiff were here he would go to prison until he paid a fine to the King."[10]

A more equitable reasonableness inquiry that eventually replaced the rule of per se invalidity appeared in the 1711 case of *Mitchell v. Reynolds*.[11] In that case, a baker assigned his lease of a bake shop to the plaintiff and agreed, in connection with the assignment, not to practice his trade as a baker in the same parish for the term of the lease. Under the agreed penalty for breach, the defendant would pay the plaintiff fifty pounds sterling. The baker violated the agreement and the plaintiff sued. The baker pleaded before the court that the damages provision was illegal as a restraint of trade. The court held that the agreement was enforceable and reasoned that while general restraints prohibiting the practice of a trade throughout the kingdom were void, limited restraints, which operated only in a particular locale,

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8. Y.B. 2 Hen. 5, fo. 5, pl. 26 (C.P. 1414); *see generally* commentary cited *supra* note 3.

9. *See* Blake, *supra* note 3, at 636. Although Blake does not discuss this point, it is interesting to consider whether this was an employee competition covenant case at all, or merely a liquidated damages or forfeiture case. For a discussion of whether a liquidated damages or forfeiture provision that is triggered by a breach of an employee competition covenant would be enforceable under existing South Carolina law, see *infra* note 131 and accompanying text.

10. From the ancient French, "per Dieu si le plaintiff fuit icy il irra al prison, tanque il ust fait fyne au Roy."

11. 24 Eng. Rep. 347 (Q.B. 1711).

were enforceable if the consideration was sufficient to show that the agreement was reasonable.[12]

The *Mitchell* court's reference to a general restraint reflects conditions prevailing in England in 1711 when competition among tradesmen in different geographical areas of the kingdom was unlikely. Not only did a lack of geographic mobility exist among tradesmen and the public at that time, but individuals began a trade at an early age and never strayed from it. Thus, opportunities for individual advancement and professional mobility, which are omnipresent today, did not exist when the "rule of reasonableness" first appeared.[13] Nevertheless, it appeared in a prescient judicial decision.

During the late eighteenth and nineteenth centuries, industrialism spawned the demise of the apprenticeship system in England[14] and resulted in greater competition among businesses, which increased social and vocational mobility. As a natural response to this evolution, employers frequently required that their employees execute employee competition covenants and other covenants not to disclose confidential information or solicit the employers' customers.[15] In the face of this rapid change, *Mitchell v. Reynolds* continued as the benchmark case even though courts applied its "reasonableness" test to new situations.

In an attempt to clarify *Mitchell v. Reynolds* over one hundred years after it was handed down, the court in *Horner v. Graves*[16] ruled that the determination of reasonableness was not limited to an examination of the consideration stated in the contract, but required a review of all facts relevant to "whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom

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12. In *Mitchell* Lord Macclesfield dutifully acknowledged the presumption that all restraints of trade are invalid, but held that the presumption in the present case had been overcome. He stated:

> A special consideration being set forth in the condition, which shews it was reasonable for the parties to enter into it, the same is good. . . . [A] man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place.

*Id.* at 348-49 (original spelling retained). *But see* Clerk v. Governor & Co., 83 Eng. Rep. 670 (1685) (bond that one shall not use his trade in a particular place is void); The Blacksmiths of South-Mims, 74 Eng. Rep. 485 (C.P. 1587) (bond not to exercise trade within the same town is against the law).

13. In Herreshoff v. Boutineau, 17 R.I. 3, 6, 19 A. 712, 713 (1890), the court stated: "Public policy is a variable test. In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now . . . ."

14. *See* Blake, *supra* note 3, at 638.

15. *Id.*

16. 131 Eng. Rep. 284 (C.P. 1831) (court held a dentist's assistant's agreement not to practice dentistry within 100 miles of employer's town if employer still practicing dentistry unreasonably broad because employer could never occupy such a wide area).

it is given and not so large as to interfere with the interests of the public."[17] The court also made it clear that the distinction between general and particular restraints, so laboriously explained in *Mitchell v. Reynolds*, was not intended to be a universal rule. Accordingly, the *Horner* court held that the function of the court was to determine "what is a reasonable restraint with reference to the particular case."[18]

In 1853 the Court of Queen's Bench finally reversed the traditional rule that all restraints of trade were per se invalid and held that the burden was on the employee to show that the covenant was unreasonable.[19] The presumption that the burden of proof should be on the employee, rather than the employer, prevailed until 1913 and is illustrative of public sentiment during this time. The basis for the presumption was crystallized by Justice Jessel in *Printing & Numerical Registering Co. v. Sampson*:[20]

> It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with the freedom of contract.[21]

English courts continued to refine the reasonableness test into the early twentieth century, while preserving, to the extent possible, an appreciation for the principle of freedom of contract. The landmark case in the early part of this century was *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*[22] There, the House of Lords finally laid to rest the *Mitchell v. Reynolds* court's distinction between "general" and "partial" restraints[23] that had troubled English courts for decades. The House of Lords decided to uphold a restraint regardless of whether it was fairly characterized as "general" or "partial" if it was no broader than reasonably necessary to protect the interests of the covenantor and not against the interests of the public.[24]

Finally, in 1913 and 1916 two cases were decided that shifted the

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17. *Id.* at 287 (original spelling retained).

18. *Id.* The court focused more on the reasonableness of the parties *inter se*, rather than reasonableness in light of public policy or general societal needs.

19. Tallis v. Tallis, 118 Eng. Rep. 482 (Q.B. 1853).

20. 19 L.R.-Eq. 462 (1875).

21. *Id.* at 465.

22. [1894] App. Cas. 535 (H.L.).

23. *See supra* note 12 and accompanying text.

24. [1894] App. Cas. 535 (H.L.).

burden of proving reasonableness back to the employer, made the reasonableness test truly formulaic, and generally transformed the law to its current approach.[25] These two cases, *Mason v. Provident Clothing and Supply Co.*[26] and *Herbert Morris, Ltd. v. Saxelby*[27] established the following principles:

> [T]he rule of reason required different measures to be applied in employee-restraint cases; second, that the employer must affirmatively show that the restraint sought to be enforced is no broader than needed for his reasonable protection; third, that the restraint must be reasonable, taking into account the interests of the employee as well as the employer; and finally, that a restraint could not be justified if its only purpose is to protect the employer from future competition, as such; in this respect postemployment restraints differ from those agreed to in connection with purchase of goodwill, for example.[28]

For the most part, the law in America regarding employee competition covenants parallels the nineteenth-century law of England, with one noticeable exception: in applying the reasonableness test,[29] American courts place even more emphasis "on protecting the employee from overly heavy burdens and less on the conclusiveness of contractual terms."[30]

## III. CURRENT SOUTH CAROLINA LAW

It is clear that South Carolina courts look with disfavor on employee competition covenants and, whether articulated or not,[31] place a

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25. *See* Blake, *supra* note 3, at 642-43. These two cases likewise provided a springboard for parallel principles that courts were developing in the United States.

26. [1913] App. Cas. 724.

27. [1916] 1 App. Cas. 688.

28. Blake, *supra* note 3, at 643. It is interesting to compare the elements of this test with those found in Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961); *see supra* note 3 and accompanying text. It appears that the English courts consistently distinguished between employee competition covenants and covenants not to compete contained in contracts for the sale of a business. This is not the case in South Carolina. *See infra* notes 109-13 and accompanying text.

29. A thorough discussion of the "reasonableness" test and the application of this rule as applied by other American courts is beyond the scope of this Article, but can be found in various compendia. *See generally* 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* §§ 542-580 (1971).

30. Blake, *supra* note 3, at 644; *Cf.* Pettit, *Modern Unilateral Contracts*, 63 B.U.L. REV. 551, 561 (1983) ("Judges often decide these disputes without inquiry into questions of contract formation; frequently, they make no effort to explain the contracting process or even to use contract terminology.").

31. Courts in relevant South Carolina cases do not state forthrightly that the employer has the actual "burden of proof" to show reasonableness, but that is the clear sense of their analysis.

burden on employers to prove that these covenants are reasonable. They justify this approach, in part, by reminding lawyers that covenants not to compete were once void as a restraint of trade.[32] Although now enforceable if certain exacting criteria are met, modern-day employee competition covenants are discussed and reviewed solely in light of the "reasonableness" inquiry as refined in previous case law but are not reviewed in light of federal or state statutes.[33]

Interestingly, no reported South Carolina decision has upheld an employee competition covenant on the grounds that parties should have complete freedom of contract, even in cases in which the fundamental elements of contract law were satisfied. Rather, South Carolina courts use the reasonableness test.[34] An employee competition covenant either stands or falls based solely upon the outcome of that test. As a result, contract law has been subordinated by judicially determined "public interest" in employee competition covenant case law, as will be evident in the following discussion of the reasonableness test in South Carolina.

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32. *See, e.g.*, Sermons v. Cain & Estes Ins. Agency, 275 S.C. 506, 273 S.E.2d 338 (1980); Almers v. South Carolina Nat'l Bank, 265 S.C. 48, 58, 217 S.E.2d 135, 140 (1975); Oxman v. Profit, 241 S.C. 28, 33, 126 S.E.2d 852, 854 (1962) ("A restrictive covenant not to compete ancillary to a contract of employment is generally looked upon with disfavor and is critically examined and construed against the employer . . . ."); Collins Music Co. v. Parent, 288 S.C. 91, 93, 340 S.E.2d 794, 795 (Ct. App. 1986).

33. Various federal statutes prohibit restraints on competition. For example, the Sherman Antitrust Act, 15 U.S.C. § 1 (1973 & Supp. 1990) prohibits contracts, combinations, and conspiracies in restraint of trade. *See generally* Goldschmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193 (1973); Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Post-employment Restraints of Trade*, 1977 U. ILL. L. REV. 621. Interestingly, no court has found a postemployment restrictive covenant to violate § 1 of the Sherman Act. *See* Bradford v. New York Times, 501 F.2d 51, 59 (2d Cir. 1974). The South Carolina Code generally prohibits arrangements, contracts and agreements that adversely effect competition, and could also provide grounds on which to find an employee competition covenant unenforceable. *See* S.C. CODE ANN. § 39-3-10 (Law. Co-op. 1976). No court has found a postemployment restrictive covenant to be invalid, however, based on a violation of that statute; indeed, no one may ever have made the argument. No legislation is currently pending in South Carolina that would clarify the existing common law of employee competition covenants. Georgia recently enacted legislation providing that such covenants are presumptively valid in certain circumstances. GA. CODE ANN. § 13-8-2.1 (Supp. 1990). The court in Hart v. Jackson & Coker, Inc., No. 90-5654-3 (DeKalb County Super. Ct. Sept. 7, 1990) and Lindsey v. Jackson & Coker, Inc., No. 90-5661-3 (De Kalb County Super. Ct. Sept. 7, 1990) (consolidated cases), however, promptly held it unconstitutional. The *Lindsey* case is currently on appeal.

34. *See* cases cited *infra* note 36.

### *A. The Reasonableness Test in South Carolina*

Over the past three decades, South Carolina courts have identified five criteria that must be satisfied for an employee competition covenant to be enforced. We will refer to these five criteria as the "reasonableness test."[35] The reasonableness test warrants that an employee competition covenant will be upheld if it:

> (i) is necessary for the protection of the legitimate interests of the employer;
> (ii) is reasonably limited in its operation with respect to time and place;
> (iii) is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
> (iv) is reasonable from the standpoint of sound public policy; and
> (v) is supported by valuable consideration.[36]

Although based in part on earlier case law, the reasonableness test had its genesis in South Carolina in *Standard Register Co. v. Kerrigan.*[37] In this case, the employer, an Ohio company engaged in the business of manufacturing and selling business forms, brought suit to enjoin a former employee, Kerrigan, from violating a provision of an employment contract. The contract provided that, for two years after leaving his employment, Kerrigan would not engage in competition with his employer by selling to his former accounts, or selling in the territory where he had performed his duties as a sales representative. The *Standard Register* employment contract[38] further provided that

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35. The term "reasonableness test" is not judicially created, and we are not aware of any other use of the term in this context. Regardless of the rubric used to describe the test, however, South Carolina courts consistently hold that a covenant that fails to meet *any one* of the five criteria will be unenforceable. *See, e.g.*, Delmar Studios v. Kinsey, 233 S.C. 313, 319, 104 S.E.2d 338, 341 (1958) (time limitation was reasonable, but employer failed to show that the extent of the territory included was necessary for the protection of the employer's business). *See also* Almers v. South Carolina Nat'l Bank, 265 S.C. 48, 56, 217 S.E.2d 135, 138 (1975) (Justice Ness stated: "The ultimate test of reasonableness depends on a shifting and weighing of the individual facts of each case."). Although South Carolina courts generally follow the less exacting expression of the reasonableness inquiry found in *Almers*, it is not the reasonableness test as that term is used herein.

36. *See, e.g.*, Rental Uniform Serv. v. Dudley, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983); Sermons v. Cain & Estes Ins. Agency, 275 S.C. 506, 508, 273 S.E.2d 338, 339 (1980) (quoting Oxman v. Sherman, 239 S.C. 218, 122 S.E.2d 559 (1961)); Collins Music Co. v. Parent, 288 S.C. 91, 93-94, 340 S.E.2d 794, 795 (Ct. App. 1986).

37. 238 S.C. 54, 119 S.E.2d 533 (1961). *Standard Register* was about an employee competition covenant in a contract expressly governed by Ohio law. Thus the court applied Ohio law, which included, *inter alia*, a version of the reasonableness test as then applied in Ohio.

38. Actually, the contract was not an employment agreement in the technical sense because Kerrigan was not promised employment for a definite time. For a discussion of

the law of Ohio govern the contract's interpretation and enforcement. After terminating his employment, Kerrigan immediately formed his own business and began to compete with Standard Register.[39]

Giving effect to the choice of law clause in the contract, the court applied Ohio law and analyzed the territorial scope of the competition covenant in light of the legitimate business interests of the employer, reasonableness to the employee, and reasonableness to the general public.[40] The court determined that the employee competition covenant satisfied the three-part inquiry and was not contrary to the public policy of Ohio. The court next analyzed the covenant in light of South Carolina law, reasoning that if it were against public policy in South Carolina (the state where Kerrigan was competing), the covenant would not be enforced in South Carolina, even though it was enforceable under Ohio law.[41]

In analyzing the competition covenant under South Carolina law, the court cited *Reeves v. Sargeant*[42] and *South Carolina Finance Corp. v. West Side Finance Co.*,[43] both of which involved covenants not to compete in contracts for the sale of a business.[44] In *Reeves v. Sargeant* the court stated that "[t]he test which generally is laid down by which it may be determined whether a contract is reasonable is whether it affords a fair protection for the interests of the party in whose favor it is made, without being so large in its operation as to

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why that fact should have been significant, see *infra* notes 91-97 and accompanying text.

39. It was admitted in the case that while Kerrigan was a sales representative for the company, he was limited to eighteen assigned accounts and that he personally contacted all but one of these former accounts for the purpose of making sales for his new corporation. Standard Register Co. v. Kerrigan, 238 S.C. 54, 59, 119 S.E.2d 533, 536 (1961).

40. *Id.* at 66-70, 119 S.E.2d at 539-41. The court also cited Welcome Wagon, Inc. v. Morris, 224 F.2d 693, 698 (4th Cir. 1955), in which the Fourth Circuit applied North Carolina law as a basis for these three considerations. *Id.* at 60, 119 S.E.2d at 536.

41. The court stated: "We know of no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its law is declared to be against public policy, immoral and void." *Id.* at 70, 119 S.E.2d at 542 (quoting Wiggins v. Postal Tel. Co., 130 S.C. 292, 295, 125 S.E. 568, 569 (1924)). *Cf.* Nasco, Inc. v. Gimbert, 239 Ga. 675, 238 S.E.2d 368 (1977) (court disregarded a choice of law clause in a contract containing an employee competition covenant because the competition covenant was against Georgia public policy).

42. 200 S.C. 494, 21 S.E.2d 184 (1942).

43. 236 S.C. 109, 113 S.E.2d 329 (1960).

44. South Carolina courts decided cases about covenants not to compete in connection with the sale of businesses long before they decided cases about employment contracts. By 1961 the South Carolina Supreme Court had decided only one employee competition covenant case, Delmar Studios v. Kinsey, 233 S.C. 313, 104 S.E.2d 338 (1958), in which the court applied North Carolina law in accordance with the terms of the contract.

interfere with the interest of the public."[45] With this methodology, the court juxtaposed the criteria formulated in *South Carolina Finance Corp. v. West Side Finance Co.*,[46] to wit: "A covenant not to compete is enforceable if it is not detrimental to the public interest, is ancillary to the sale of a business or profession,[47] is reasonably limited as to time and territory, and is supported by valuable consideration."[48] Merging and applying the criteria established in these two cases, Justice Moss in *Standard Register* concluded: "We think the restrictive covenant not to compete limited to the eighteen assigned accounts, and limited in duration to two years, was reasonable as to the employer, the employee and the public, and hence, the provision is not contrary to the public policy of this State."[49]

The five criteria that constitute the South Carolina reasonableness test are derived from decisions after *Standard Register*. These decisions will not be discussed chronologically, because in the almost thirty years since the *Standard Register* court first articulated the reasonableness test, refinement of its elements ceased. The remainder of this Section will consider the five criteria topically, in light of the cases in which the courts applied them.

### 1. *The Covenant Is Necessary for the Protection of the Legitimate Interests of the Employer*

Although the employer's "legitimate" interests to enforce an employee competition covenant are technically the first criteria the courts examine under the reasonableness test, they are little more than a steppingstone for the court to evaluate the reasonableness of a geo-

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45. *Reeves*, 200 S.C. at 498-99, 21 S.E.2d at 186 (citing 17 C.J.S. *Contracts* § 247 (1963) (current section and edition).

46. 236 S.C. 109, 113 S.E.2d 329 (1960).

47. This criterion did not apply in *Standard Register* because the court was dealing with a postemployment restraint. Later cases refer to postemployment restraints as reasonable, however, if ancillary to a lawful contract. *See, e.g.*, Riedman Corp. v. Jarosh, 289 S.C. 191, 192-93, 345 S.E.2d 732, 733 (Ct. App.), *aff'd*, 290 S.C. 252, 349 S.E.2d 404 (1986); *see also* Almers v. South Carolina Nat'l Bank, 265 S.C. 48, 52, 217 S.E.2d 135, 136 (1975) (restrictive covenant in a pension plan).

48. South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 119, 113 S.E.2d 329, 334 (1960) (citing 36 AM JUR. *Monopolies, Combinations and Restraints of Trade* §§ 52-56 (1941)); *see* Somerset v. Reyner, 233 S.C. 324, 104 S.E.2d 344 (1958); Reeves v. Sargeant, 200 S.C. 494, 21 S.E.2d 184 (1942); Metts v. Wenberg, 158 S.C. 411, 155 S.E. 734 (1930).

49. Standard Register Co. v. Kerrigan, 238 S.C. 54, 71-72, 119 S.E.2d 533, 542 (1961). Incidentally, like the court in *Standard Register*, the court in *South Carolina Financial Corp.* never articulated the "public policy" they sought to protect.

graphic restriction in that covenant.[50] Courts rarely examine the employer's interests in and of themselves.

Although not discussed in any reported South Carolina decision, employers have many legitimate interests in using employee competition covenants.[51] For example, employers have an interest in training their employees and a concomitant interest to ensure that the investment in this training is recouped to some extent, and that the training, particularly if specialized, is not used against them by former employees.[52] Likewise, employers have a legitimate interest in ensuring that their confidential information and trade secrets[53] are not used by a competitor. No South Carolina court in a reported decision regarding employee competition covenants, however, has ever examined these or other legitimate expectations or rights of employers.

This first criterion goes to the heart of at least one expression of modern public policy—that the public has an interest in the ability of businesses to safeguard their capital against pirating, counterfeiting, and unfair use by former employees.[54] This interest or policy is at loggerheads with traditional public policy in the area of employee competition covenants, namely, that individuals have a right to practice their chosen trade and that society benefits from "fair" competition.[55] The ability of courts to reconcile these competing interests will be facilitated by the new analytical approach to employee competition covenants set forth in this Article.

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50. *See infra* notes 56-68 and accompanying text.

51. *See* WHITE PAPER, *supra* note 2, at 13-14, (listing and discussing five "legitimate" interests including (1) protection of trade secrets and confidential information, (2) preservation of customer relations, (3) protection of investments in employer training, (4) securing exclusive use of unique talents of key employees, and (5) in the sale of business context, the preservation of goodwill). *See also* Comment, *supra* note 3, at 716 (covenants not to compete protect against disclosure of information and protect investments in training).

52. Numerous commentators have written about the investment a business makes in its employees or "human capital." *See generally* Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 95-96 (1981) (employers usually pay for general training in the form of reduced wages, but determining who should pay for training depends on the employer's perceived return on his investment in that training); Note, *Economic and Critical Analyses of the Law of Covenants Not to Compete*, 72 GEO. L.J. 1425 (1984).

53. *See infra* notes 114-19 and accompanying text.

54. South Carolina generally prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices . . . ." S.C. CODE ANN. § 39-5-20 (Law. Co-op. 1976). It appears, however, that this statute has never been used in the postemployment context in a reported South Carolina case. *Cf. supra* note 33 and accompanying text with respect to federal and state antitrust laws.

55. *See supra* note 33 and accompanying text.

### 2. *The Covenant Is Reasonably Limited in Operation with Respect to Time and Place*

#### *a. Geography*

The territorial scope of an employee competition covenant will render the restraint unreasonable if it covers a geographic area broader than is necessary to protect the "legitimate interest" of the employer.[56] The courts have expanded this element of the test by declaring that a covenant, to be enforceable, must be limited to the area in which the employee actually worked.[57] In 1958, three years before the *Standard Register* decision, the South Carolina Supreme Court decided *Delmar Studios v. Kinsey*.[58] The court, applying North Carolina law, stated that a restrictive covenant "must not restrain [the employee's] activities in a territory into which his former work has not taken him or given him the opportunity to enjoy undue advantage in later competition with his employer."[59] The *Delmar* court disregarded the geographic scope of the employee competition covenant because the area in which the employee actually worked was smaller than the area described in the covenant.[60]

Three years later, in the same year as *Standard Register*, this critical analysis of the employee's territory was applied in *Oxman v. Sherman*,[61] which involved an employment contract entered into between

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56. *See* Standard Register Co. v. Kerrigan, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961).

57. *See* Rental Uniform Serv. v. Dudley, 278 S.C. 674, 676, 301 S.E.2d 142, 143 (1983) ("A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers."); Oxman v. Sherman, 239 S.C. 218, 225, 122 S.E.2d 559, 562 (1961).

58. 233 S.C. 313, 104 S.E.2d 338 (1958).

59. *Id.* at 321, 104 S.E.2d at 342 (quoting Wisconsin Ice & Coal Co. v. Lueth, 213 Wis. 42, 250 N.W. 819 (1933)). In *Delmar* the employee, Kinsey, signed an employment contract which stated that for a period of two years following the date of termination of his employment, he would not "engage in, or become financially interested in the business of soliciting and procuring from schools within the Territory applications for photographs or yearbook contracts, or in the business of taking of photographs in the fulfillment of any such contract . . . ." *Id.* at 316, 104 S.E.2d at 339.

60. *Id.* at 319-20, 104 S.E.2d at 341. The court found that the time limitation was reasonable, but that the employer failed to prove that the extent of the territory was necessary for the protection of its business. The territory mentioned in the contract covered approximately three-fourths of the state of North Carolina, all of South Carolina, and eleven counties of Georgia. *Id.* at 316, 104 S.E.2d at 339. During his employment, Kinsey was assigned to ten counties in South Carolina, six counties in Georgia, and at no time did he solicit business in North Carolina. *Id.*

61. 239 S.C. 218, 122 S.E.2d 559 (1961).

an insurance company and its agent in 1956. The contract provided:

> While the agent is soliciting applications for policies of insurance issued by the Company . . . and for a period of one year thereafter, agent agrees that he will not directly or indirectly be connected with any other health and accident or life insurance company engaged in similar business to the business conducted by the [employer] in any territory within the State of South Carolina.[62]

After signing the contract, the agent's territory was revised to consist only of Orangeburg and Calhoun counties. The employer later promoted the agent to field manager over all agents in South Carolina, a position that required him to travel to every county in the state. In 1961 the agent left the company and became a licensed agent for another insurance company. The employer subsequently sued to enforce the covenant. The court held that the covenant was too broad to be enforceable and that in any event, the one-year period had expired.[63]

The court's reasoning suggests two nuances of the geographic criterion. First, in order to have an enforceable covenant, the employer must limit the scope to an area in which the employee works or with which the employee is to come in contact.[64] Obviously, the actual extent of the area may be impossible to determine at the outset of employment.[65] Second, if the employer's attorney drafts a contract containing a territorial restriction identical to the area with which the employee comes in contact during his employment, that contract would have to be amended, or a new contract entered into, any time that area changed.[66]

The court in *Oxman v. Sherman* afforded significant protection to the employee and gave little consideration to basic contract principles. The court did not define the public policy it sought to protect[67] or the

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62. *Id.* at 222, 122 S.E.2d at 560.

63. *Id.* at 224-25, 122 S.E.2d at 562.

64. *Id.* at 225, 122 S.E.2d at 562 (citing Delmar Studios v. Kinsey, 233 S.C. 313, 104 S.E.2d 338 (1958)).

65. The same problem exists when a company has offices or does business in various areas, but the employee only physically works at one office or in one area. This situation presents problems in drafting enforceable employee competition covenants for most sophisticated state-wide and national businesses.

66. The employer who requires that an employee enter into a new covenant after he is employed, without granting the employee a bonus, an increase in salary, or a promotion, may be left with a covenant which is unenforceable for lack of sufficient consideration. *See infra* notes 98-102 and accompanying text.

67. The contract at issue also contained a covenant that in the event of the termination of the agent's association with the company, he would not induce any employees to terminate their association with the company. As to this covenant, the court did mention public policy, stating that the covenant is reasonable and violates no public policy. Oxman v. Sherman 239 S.C. 218, 226, 122 S.E.2d 559, 562 (1961).

actual effect the covenant had, or would have had, on the legitimate efforts of the employee to earn a livelihood. The case further suggests that South Carolina courts, in their zeal to defend the employee, merely shop the five criteria of the reasonableness test to identify those which the competition covenant will fail to meet.[68]

### *b. Time*

The courts have given very little guidance about what constitutes a reasonable time except to say that a restraint against competition "at any time" cannot be justified.[69] In *Delmar* the court only made mention of the two-year time restraint at issue as being "reasonable" and then found the covenant unenforceable on other grounds.[70] Later, in *Rental Uniform Service v. Dudley*[71] the court found repose in the following tautology:

> The three-year time restraint is only a year longer than the two-year restraint described as reasonable in *Delmar Studios of the Carolinas v. Kinsey*. The Court in *Sermons* stated that a limitation of two or three years, may not be obnoxious in the context of a noncompetition agreement, while in that case the restraint at "any time" could not be justified. Consequently, the time limitation alone is not unreasonable.[72]

Likewise, in *Oxman v. Sherman*[73] Justice Oxner explained that shortly after execution of the contract, the defendant ceased working as an agent; thus, the clock began to run on the one-year restraint.[74] Interestingly, the defendant never questioned when the one-year period was to begin.[75]

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68. This point calls into question Justice Ness's statement in *Almers* about weighing and balancing the facts of each case. Almers v. South Carolina Nat'l Bank, 265 S.C. 48, 56, 217 S.E.2d 135, 138 (1975) (*see supra* note 35). This quote suggests that the court is doing more justifying than true weighing.

69. Sermons v. Caine & Estes Ins. Agency, 275 S.C. 506, 509, 273 S.E.2d 338, 339 (1980).

70. Delmar Studios v. Kinsey 233 S.C. 313, 319, 104 S.E.2d 338, 341 (1958).

71. 278 S.C. 674, 301 S.E.2d 142 (1983).

72. *Id.* at 676, 301 S.E.2d at 143 (citation omitted).

73. 239 S.C. 218, 122 S.E.2d 559 (1961).

74. *Id.* at 225, 122 S.E.2d at 562. Although the case is unclear about the date of the defendant's first promotion, it appears that it was very soon after he executed the contract. The record reflects the contract was executed on October 2, 1956, "soon thereafter" he was promoted to unit manager to supervise and train new agents, and that "on or about the first part of 1958" he was promoted to the position of field manager. *Id.*

75. The question of when a postemployment feature of a covenant should begin and end is the subject of considerable debate. Although this Article purposefully avoids the issue of remedies, it is noteworthy that several authorities have argued that the time

South Carolina courts have failed to provide an adequate benchmark of what constitutes a reasonable time. As a result, employers and their attorneys have little guidance to determine what the duration of an employee competition covenant may be. Perhaps more harmful than the court's specific failure to offer meaningful clues about what constitutes a "reasonable" time is its general failure to clarify how a reasonable time period in one instance may be unreasonable in another. Doubtless, this failure has led to the widespread belief among lawyers that a three-year restraint falls within some magical safe harbor.[76] Indeed, it may be that a five- or ten-year restraint would be reasonable if other considerations were met.[77] Thus, the issue of temporal reasonableness is at least inextricably related to the other elements of the reasonableness test. Furthermore, the time limitation itself in a given case cannot be weighed or measured against time limitations approved or disapproved in other cases, regardless of their factual similarity.

### 3. *The Covenant Cannot Be Unduly Harsh by Curtailing the Legitimate Efforts of the Employee to Earn a Livelihood*

Courts seldom discuss this criterion except to say it is necessary to determine whether an employee competition covenant is enforceable.[78] Yet this criterion would appear to be the most critical in light of the public interest these cases apparently seek to protect.[79] Therefore, the absence of a meaningful discussion of it in the decided cases is surprising. Indeed, if an employee has a legitimate way to earn a livelihood without being in breach of a covenant, is the covenant a restraint of trade at all, and should the terms of the covenant be as carefully scrutinized?

Notwithstanding their silence on the matter, South Carolina courts do consider the interests of the employee. Protection of the employee is a general theme that runs throughout all employee competi-

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should begin only *after* the employee is enjoined, or ceases, from competing in violation of a covenant. *See, e.g.*, Comment, *Economic and Critical Analysis of the Law of Covenants Not to Compete*, 72 GEO. L. J. 1425 (1984).

76. This perception is based on many conversations with other attorneys and a review of many employee competition covenants drafted by other attorneys.

77. WHITE PAPER, *supra* note 2, at 12, suggests a six-month safe harbor.

78. *See* Rental Uniform Serv. v. Dudley, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983); Sermons v. Caine & Estes Ins. Agency, 275 S.C. 506, 508, 273 S.E.2d 338, 339 (1980); Collins Music Co. v. Parent, 288 S.C. 91, 93, 340 S.E.2d 794, 795 (Ct. App. 1986).

79. The right of every person to practice his chosen trade is the very public policy interest that early English cases sought to protect. *See supra* notes 8-30 and accompanying text.

tion covenant cases.[80] Still, more often than not, courts strike down covenants based upon overbroad time or geographic elements without ever reaching a discussion of the employee's ability to earn a livelihood.[81] The basis for courts to find a restraint to be overbroad is often that it is greater than necessary to protect the legitimate interests of the employer.[82] In fact, no South Carolina case has held that an employee competition covenant meets each of the other criteria of the reasonableness test, but is unenforceable solely because the employee is unable to earn a livelihood elsewhere. Clearly, this is the very policy these cases appear to invoke—that one has the right to practice one's chosen trade.

### 4. *The Covenant Must Be Reasonable from the Standpoint of Sound Public Policy*

The most puzzling feature of the law of employee competition covenants in South Carolina is the absence of any meaningful discussion of public policy. Almost every decided case mentions it, but no case analyzes it.[83] The approach of the courts is to address each of the other

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80. *See, e.g.*, *Sermons*, 275 S.C. at 509, 273 S.E.2d at 339 (covenant restricting competition throughout the entire state was an unwarranted limitation on the employee's right to earn a livelihood); Oxman v. Sherman, 239 S.C. 218, 225, 122 S.E.2d 559, 561 (1961) (the one-year time restraint had already run based upon the wording of the contract, an issue that the employee had not even raised in the defense of his case); Delmar Studios v. Kinsey, 233 S.C. 313, 319, 104 S.E.2d 338, 341 (1958) (territory covered in the covenant was too extensive and the employer had the burden to show that it was necessary for the reasonable protection of its business).

81. *See* cases cited *supra* note 64. In each of these cases the court did not discuss the employee's interest. However, the employee was sufficiently protected by the outcome.

82. *See supra* notes 56, 60 and accompanying text.

83. We are reminded of Justice Stewart's characterization of pornography as "I know it when I see it" in Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring). *See also* cases cited *supra* notes 50, 68, 78 and accompanying text. One employee competition case that does discuss public policy is Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc., 410 F. Supp. 967 (D.S.C. 1976). The court discussed a different type of public policy, one which precludes enforcement of a contract by a party who has breached that very contract. The court found that the employer breached the employment contract which contained the employee competition covenant. As to the reasonableness of the covenant, the court cited Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961), for the principal that enforcement should be allowed only when the covenant is reasonable and consistent with sound public policy. It stated:

> To defer to the concern for sound public policy mandated by *Kerrigan*, it seems imperative that this court recognize that a covenant otherwise reasonable in form and scope may become unreasonable and unenforceable when enforcement is sought by a party who has breached the very contract which contains the covenant.

criteria and presume that if the covenant satisfies them, the interests of the public will be protected. Clearly, if the court wants to protect public policy, a balancing of interests that genuinely focuses on the public, rather than on individuals in specific factual settings, must exist.

Under early English common law, public policy seemed to mandate tipping the scales of justice in favor of the employee by placing the burden upon the employer to prove that the covenant was necessary for the protection of his business.[84] For the public truly to be protected in modern society, however, perhaps the burden should be on neither the employer nor the employee, assuming that the employee is adequately protected by other principles of common law.[85] Today, the public has as much of an interest in protecting the interests of legitimate businesses as it does in protecting those businesses' employees.[86] Indeed, if an employer takes advantage of its employee in the context of an employment agreement by either failing to provide "sufficient" consideration for the covenant or by compelling the employee to sign under duress, the covenant will fail under a general contract analysis. These safeguards may obviate the need for an examination of public policy and could allow the courts to peel back the public policy concerns that encase this line of decisions.

### 5. *The Covenant Must Be Supported by Valuable Consideration*

The final criterion included in the reasonableness test is that the employee competition clause be supported by valuable consideration. This criterion, both in its application by the courts and in its location within the reasonableness test, is clearly misplaced: it should be first rather than last. The effect of this misplacement is not, however, merely academic for either lawyers or judges. Because an analysis of consideration is obscured and diluted by the other elements of the reasonableness test, when lawyers draft employee competition covenants and give advice about administration of contracts containing such covenants, they routinely overlook the consideration requirement.[87] Ar-

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*Associated Spring Corp.*, 410 F. Supp. at 977. The court's concern for public policy was obscured by its valid treatment of a contract under sound principles of equity. This raises the question whether equity and public policy are really coextensive.

84. *See supra* note 13 and accompanying text.

85. *See infra* notes 104-08 and accompanying text.

86. For example, businesses have a legitimate interest to protect their financial investment in employees in the form of specialized training and to protect trade secrets and confidential information. *See supra* text accompanying notes 52-53.

87. The requirement of consideration may be satisfied in various ways other than by drafting a contract with comprehensive recitals of facts or by paying money to the

guably, and in their defense, lawyers become so preoccupied with satisfying other reasonableness test criteria that they overlook the basics, such as the requirement of sufficient consideration.

In traditional contract cases, courts have refused to address the sufficiency or adequacy of consideration.[88] In employee competition covenant cases, by examining consideration in the context of reasonableness instead of fundamental contract law, however, courts have departed from the well-established doctrine that the adequacy of consideration is assumed.[89] Although the adequacy of consideration is examined in many employee competition covenant cases, the treatment of the requirement of adequacy is heightened in cases of at-will employment and those in which the alleged consideration is continued employment.[90]

In South Carolina, the promise of at-will employment is generally considered sufficient consideration to support an employee competition covenant in a contract.[91] In *Riedman* the South Carolina Court of Appeals considered an employee competition covenant contained in an employment contract that "could be terminated by either party at any time upon written notice to the other."[92] In addressing the issue, the court remarked "we have been unable to locate a South Carolina decision concerning the question of whether an at-will employment contract provides sufficient consideration for a covenant not to

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employee. Likewise, careless contract administration can result in a failure of consideration. For example, if a new employee is asked to sign an employment agreement the day after he accepts the job, consideration to support an employee competition covenant in the agreement may be absent, because the offer of employment was accepted by the employee the day before. An employer who wishes to have existing employees sign agreements containing certain employee competition covenants can avoid this problem by offering the employees a raise, bonus, or promotion contingent on the employee signing the agreement.

88. J. CALAMARI & J. PERILLO, CONTRACTS §§ 4.4, 4.6 (3d ed. 1987); RESTATEMENT (SECOND) OF CONTRACTS § 79 comment c (1981).

89. *See, e.g.*, Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987); Standard Register Co. v. Kerrigan, 238 S.C. 54, 73, 119 S.E.2d 533, 543 (1961); Riedman Corp. v. Jarosh, 289 S.C. 191, 193, 345 S.E.2d 732, 733 (Ct. App.), *aff'd*, 290 S.C. 252, 349 S.E.2d 404 (1986); *see also* Admar, Inc. v. Satterwhite, 37 N.C. App. 410, 414, 246 S.E.2d 165, 167 (1978). *See generally* Note, *Consideration for Employee Noncompetition Covenants in Employments at Will*, 54 FORDHAM L. REV. 1123, 1127 (1986). For law in other jurisdictions, see Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Territorial Extent of Restriction*, 43 A.L.R.2D 94 (Later Case Serv. 1980 & Supp. 1989).

90. *See, e.g., Springs Indus., Inc.*, 292 S.C. at 481, 357 S.E.2d at 452 (at-will employment); *Standard Register*, 238 S.C. at 54, 119 S.E.2d at 533 (mere continued employment not sufficient consideration); *Riedman*, 289 S.C. at 191, 345 S.E.2d at 732 (at-will employment).

91. *See Springs Indus., Inc.*, 292 S.C. at 484, 357 S.E.2d at 454.

92. *Riedman*, 289 S.C. at 192, 345 S.E.2d at 733.

compete."[93]

In *Riedman* the employee argued that no mutuality of obligation existed in his contract because his employer could fire him at any time. The employee argued that the employee competition covenant was not supported by consideration and, therefore, was unenforceable. The court disagreed, stating: "Consideration is essential; mutuality of obligation is not, unless the want of mutuality would leave one party without a valid or available consideration for his promise. . . . Since we find good and sufficient consideration, the contract is not lacking in mutuality of obligation."[94] On appeal the supreme court affirmed the decision of the court of appeals, holding that a covenant not to compete may be enforced when the consideration is based solely upon the at-will employment itself.[95]

The court cited *Riedman* in *Small v. Springs Industries, Inc.*,[96] in which the narrow issue, for present purposes, was whether there was consideration to support a finding that an employee handbook was an agreement between the employer and the employee. The handbook was issued to the employee after she had been working for five years under an at-will employment arrangement. The court held that the handbook was a unilateral agreement whereby "Springs made an offer or promise to hire Small in return for specified benefits and wages. Small accepted this offer by performing the act on which the promise was impliedly or expressly based."[97]

The characterization by the court in *Springs Industries* that employment-at-will can give rise to a unilateral agreement is inconsistent with the court's apparent position regarding continued employment as consideration for an employee competition covenant.[98] Indeed, earlier

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93. *Id.* at 193, 345 S.E.2d at 733. The notion of sufficiency may have come from other jurisdictions cited by the court or it may have come from *Standard Register*, which states that under North Carolina law, ordinary employment is a "sufficient consideration." *Standard Register*, 238 S.C. 54, 119 S.E.2d 533 (1961) (citing Kadis v. Britt, 244 N.C. 154, 29 S.E.2d 543 (1944)).

94. *Riedman*, 289 S.C. at 193, 345 S.E.2d at 734 (court of appeals' opinion).

95. Riedman Corp. v. Jarosh, 290 S.C. 252, 349 S.E.2d 404 (1986).

96. 292 S.C. 481, 357 S.E.2d 452 (1987). This case is also noted for its holding that an employee handbook can constitute an employment agreement between the employer and employee.

97. *Id.* at 484, 357 S.E.2d at 454. The court stated: "Springs' promise constituted the terms of the employment agreement. Small's action or forbearance in reliance on Springs' promise was sufficient consideration to make the promise legally binding." *Id.* Justice Gregory, in his dissent, criticized the majority's characterization of the employment contract as "unilateral," noting that mere continuation of employment is not sufficient consideration to support an agreement altering the terms of a preexisting employment contract. *Id.* at 487, 357 S.E.2d at 456.

98. The court in *Springs Industries* held that a unilateral contract was established when an employee was impliedly bound to abide by a newly issued handbook as a condi-

case law offers support for that conclusion. For example, in *Standard Register Co. v. Kerrigan*[99] the court applied the rule set forth in *Kadis v. Britt*,[100] a North Carolina case, as follows:

> In . . . *Kadis v. Britt*, it was held that ordinarily employment is a sufficient consideration to support a restrictive negative covenant, but where the employment contract is supported by purported consideration of continued employment, and containing covenants of employee, who occupied a subordinate position of deliveryman and bill collector, not to disclose any business affairs of employer and not to enter employment of any competitor within a designated territory for two years after termination of employment, was without consideration where, contract was exacted after several years employment and the employee's duties and position were left unchanged.[101]

Thus, it appears that the court would hold that a promise of mere continued employment is insufficient consideration to support the enforcement of an employee competition covenant. On the other hand, such a holding could be controverted by an application of the unilateral contract theory expressed in *Springs Industries*.[102]

When continued employment is offered as the sole consideration for an employee competition covenant, the employee is threatened many times with termination if he does not execute the covenant.[103] The unilateral contract theory, which suggests that the employer's offer not to fire the employee may be accepted by the employee's continued performance of his duties, is nearly impossible to reconcile with public policy-based presumptions in favor of employers that the court has espoused in other decisions. Yet, interestingly, the bifurcation of at-will employment and continued employment cases in the examination of consideration (and indeed in the examination of adequacy of consideration altogether), apparently is derived from a need to protect individuals from overbearing employers. However, public policy considerations again have tainted standard contract analysis.

Other well-established contract law principles preserve the public policy interest in examining consideration, leaving the fundamental na-

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tion of continued employment. If this theory were applied to the normal at-will employment situation, a court could also hold that the employee's agreement to continue to work for the employer after the employee had signed an employee competition covenant satisfied the unilateral contract analysis, even if the employee were given no *new* consideration. *Id.* (emphasis in original).

99. 238 S.C. 55, 119 S.E.2d 533 (1961).

100. 224 N.C. 154, 29 S.E.2d 543 (1944).

101. Standard Register Co. v. Kerrigan, 238 S.C. 54, 73, 119 S.E.2d 533, 543 (1961) (citations omitted).

102. *See supra* note 98.

103. See Note, *supra* note 89, at 1127, 1131.

ture of that examination intact. For example, duress is clearly a basis to avoid a contract.[104] An employee forced to sign either an employee competition covenant or suffer termination may be subjected to such duress that the contract may be voidable by the employee. Courts have gone to great lengths to protect the interests of the employee, although not one supreme court or court of appeals case considering an employee competition covenant in South Carolina has mentioned coercion or duress.[105] Likewise, no case has mentioned the possibility that when extreme circumstances exist in the formation of a contract, an employee competition covenant may be unconscionable.[106] Although a finding of unconscionability is a severe result, it would likely provide a useful tool in a number of cases.[107] Certainly, defenses such as duress and unconscionability, as well as other defenses and theories not included in the reasonableness test, would aid the courts in rendering just and rational decisions in employee competition covenant cases.[108]

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104. South Carolina follows the general rule of contract law that duress renders a contract voidable at the option of the oppressed party. *See* Santee Portland Cement Corp. v. Mid-State Redi-Mix Concrete Co., 273 S.C. 784, 260 S.E.2d 178 (1979). As to "economic duress," the South Carolina Court of Appeals held that it will not recognize economic duress as a separate tort upon which one can sue, implying that the oppressed party's sole relief is to avoid the contract. Troutman v. Facetglas, Inc., 281 S.C. 598, 602-03, 316 S.E.2d 424, 426-27 (Ct. App. 1984). The *Troutman* case provides a lengthy discussion of the elements necessary for a cause of action for economic duress as established by states in which such an action is recognized. As a basis for the court's refusal to recognize economic duress as a cause of action, it quoted the *Restatement (Second) of Contracts* as follows: "[D]uress and undue influence, unlike deceit, are not generally of themselves actionable torts; the victim of duress or undue influence is usually limited to avoidance and does not have an affirmative action for damages." *Id.* at 602, 316 S.E.2d at 426 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 173 (1981)).

105. *See* Note, *supra* note 89, at 1127:

> The proper analysis of non-competition covenants in employments at will should address two separate problems: [1] whether there is consideration to support the covenant and [2] whether it is fair under the particular circumstances of the case to enforce a covenant that is presented after the employment relationship is already established. The first problem is one of contract formation, the second of unconscionability or avoidance due to coercion.

*Id.*

106. The most refined statement of the law on unconscionability is found in U.C.C. § 2-302 (1989). Although the scope of § 2-302 is limited to sales transactions, it has been used by analogy in other instances. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (defining unconscionability as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."); Comment, *supra* note 3, at 725-26.

107. A finding of unconscionability would be particularly useful when an unskilled worker with a long employment history is told to sign or be fired.

108. Sophistication of the parties figures prominently in duress and unconscionability arguments. It is not a traditional element in the reasonableness test, but is considered by the courts in their evaluation of public policy and its rightful beneficiaries. Likewise,

### B. *Toward Synthesis and Consistency*

This Section will illustrate unwarranted inconsistencies between the judicial treatment and interpretation of employee competition covenants and certain other restrictive covenants that are closely related to employee competition covenants in use or effect. In some instances, such as covenants not to compete in connection with the sale of a business, the courts have applied the reasonableness test when they should not have. In other instances, courts have failed to draw useful comparisons to employee competition covenant situations when such comparisons would have yielded more rational results and consistency with respect to policy and approach. The following discussion is not intended to be a complete analysis of the courts' treatment of these other restrictive covenants, but is offered as a basis to re-evaluate the existing approach to employee competition covenants.

#### 1. *Sale of Business Covenants*

Historically in South Carolina, members of both the bench and the bar have looked to case law concerning restrictive covenants contained in contracts for the sale of businesses as precedent for employee competition covenant cases.[109] Granted, South Carolina courts have admitted important distinctions between the two seemingly similar covenants,[110] but no South Carolina court has ever clearly articulated why they should be treated differently.[111] Nevertheless, the basis for con-

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the ability of the court to "blue pencil" an unreasonable covenant might propel the court to be more lenient toward employers. A discussion of the blue pencil rule as applied in South Carolina is beyond the scope of this Article. *See generally* 5 S. WILLISTON, CONTRACTS § 659 (3d ed. 1961); Comment, *Contract Law-The Status of the Blue Pencil Rule as Applied in South Carolina Covenants Not to Compete*, 28 S.C.L. REV. 726 (1977); *see also* Eastern Business Forms v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972) (court refused to blue pencil a covenant not to compete and declared covenant invalid); Somerset v. Reyner, 233 S.C. 324, 104 S.E.2d 344 (1958) (court refused to apply the blue pencil rule to a territory that was not readily severable).

109. Indeed, the first employee competition covenant case in South Carolina, Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961), borrowed from Reeves v. Sargeant, 200 S.C. 494, 21 S.E.2d 184 (1942), and South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329 (1960).

110. *See* Oxman v. Sherman, 239 S.C. 218, 224, 122 S.E.2d 559, 561 (1961) (noting that postemployment restrictive covenants are looked upon with less "indulgence" than sale of business restrictive covenants); *see also* Reeves v. Sargeant, 200 S.C. 494, 21 S.E.2d 184 (1942) (court upheld a restrictive covenant in connection with the sale of a business even though it contained time restraints that would probably be unreasonable in an employee competition covenant).

111. No South Carolina decision has ever explained carefully the significance of "goodwill" in a sale-of-business covenant case. Other states have considered whether the

trast is clear: in sale of business cases, the goodwill conveyed with the business may often be protected only by an ancillary agreement by the seller not to compete with the business sold,[112] and generally consideration is not an issue.

Still, South Carolina courts apply the reasonableness test to evaluate covenants not to compete in connection with the sale of a business just as they would analyze a similar covenant in an employment agreement. It even appears that the two types of covenants are distinguished by the courts based only on the length of time for which they may be enforced.[113] We submit that sale of business cases are not apposite to the employment cases, and that neither body of case law should be used to examine or illuminate the other, except with respect to the public policy principles both types of covenants may seek to protect.

### 2. *Covenants Not to Disclose Confidential Information*

Our thesis that the application of simple contract principles, rather than a rigid test, is necessary to achieve just and rational results in the area of employee competition covenants is supported by an examination of the judicial treatment of covenants by employees not to disclose the confidential information of their former employer. This comparison also supports our position that a true appreciation of modern public policy mandates a balancing of the interests of the employer and the employee and an abandonment of archaic presumptions against employers.[114]

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conveyance of goodwill can justify the covenant. *See, e.g.*, Hood v. Legg, 160 Ga. 620, 128 S.E. 891 (1925).

112. Typically, in the asset sale of a business, the acquisition agreement contains a goodwill conveyance clause. Goodwill embodies customer name recognition, business opportunities and strategies, and profit-making potential. Many times, the only way to convey and protect goodwill is by drafting a clause in the sale agreement so that the seller covenants not to use that goodwill or other intangible property in competition with the purchaser.

113. Covenants not to compete in connection with the sale of businesses are commonly assumed to be enforceable for up to five years, but employee competition covenants are assumed to be enforceable for only three years. As mentioned in note 76, we do not know the source of the three-year "presumption," but warn that it is dangerous for the drafter to rely on it, particularly when the covenant fails to meet other elements of the reasonableness test.

114. Employee competition covenant cases consistently state or imply that the burden of proof is on the employer to show that the covenant is enforceable. *See* Sermons v. Caine & Estes Ins. Agency, 275 S.C. 506, 273 S.E.2d 338 (1980); Derrick, Stubbs & Stith v. Rogers, 256 S.C. 395, 182 S.E. 2d 724 (1971); Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961); Oxman v. Sherman, 239 S.C. 218, 122 S.E.2d 559 (1961); Delmar Studios v. Kinsey, 233 S.C. 313, 104 S.E.2d 338 (1958); Somerset v. Reymer, 233

Courts that have considered an employee's duty not to disclose confidential information[115] or trade secrets[116] of an employer have uni-

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S.C. 324, 104 S.E.2d 344 (1958).

115. "Confidential information" is not protected by statute in South Carolina. Indeed, no South Carolina court has precisely defined the term. Rather, courts have looked only to the definition found in contracts sought to be enforced by an employer. Confidential information may be defined, however, as competitively sensitive information that may not arise to the level of a trade secret. See *infra* note 116. Various treatises contain useful information relating to confidential information. The *Restatement (Second) of Agency* contains prohibitions against an agent disclosing confidential information of a principal, both during and after the term of the agency relationship. RESTATEMENT (SECOND) OF AGENCY §§ 395-396 (1958); *see also* Brait, *Confidentiality in the Employment Relationship*, 5 INTELL. PROP. J. 187, 193 (1990) (discussion of measures an employer should take to keep information confidential); *see generally* Hutter, *Drafting Enforceable Employee Non-Competition Agreements to Protect Confidential Business Information: A Lawyer's Practical Approach to the Case Law*, 45 ALB. L. REV. 311 (1981).

116. Trade secrets, unlike confidential information, are susceptible to more precise definition. Although South Carolina has not adopted it, most jurisdictions have adopted some variation of the definition of trade secret found in the *Restatement of Torts*:

> § 757 Liability for Disclosure or Use of Another's Trade Secret-General Principle.
>
> One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if
>
> (a) he discovered the secret by improper means, or
>
> (b) his disclosure or use constitutes breach of confidence reposed in him by the other in disclosing the secret to him, or
>
> (c) he learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other, or
>
> (d) he learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.
>
> . . .
>
> Comment b. Definition of trade secret. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

RESTATEMENT OF TORTS § 757 (1939). For a discussion of trade secrets law and legislation, see Day, *Protection of Trade Secrets in South Carolina*, 42 S.C.L. REV. 689 (1991); Quittmeyer, *Trade Secrets and Confidential Information under Georgia Law*, 19 GA. L. REV. 623 (1985). In 1989 Georgia passed H.B. No. 252, to provide statutory protection of trade secrets in that state. *See* O.C.G.A. §§ 10-1-761 to -767 (Michie 1989 & Supp. 1990). *See also* 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* §§ 704-710 (1971). A good definition of trade secrets that has been relied upon by South Carolina courts is contained in Wilkes v. Pioneer Am. Ins. Co., 383 F. Supp. 1135, 1139 (D.S.C. 1974) (trade secrets are subject to common-law protection and enjoy that protection notwithstanding the fact that no statutory trade secret protection exists in South Carolina). In Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944), the court recognized that "the right of an employer to protect, by reasonable contract with his employee, the

formly attempted to find and enforce that duty.[117] In this area, courts impose no presumptions against employers and do not subject the employee's promise or covenant not to disclose to a rigid test or analysis.[118] Rather, recognizing the public policy reasons for finding such covenants to be presumed valid, courts seek to enforce them.[119]

The method of analysis South Carolina courts apply to covenants not to disclose information relative to that applied to employee competition covenants is not consistent. In many instances, the covenants, often found side-by-side in the same contract, seek to prohibit the same thing, that is, the use by the former employee of information gained while he worked for his former employer. When South Carolina courts consider the enforceability of a covenant not to disclose, they do not attempt to dissect the contractual language and factual circumstances under the reasonableness test. Such preferential treatment may result from courts' recognition of the importance of the proprietary information of a business, a factor which has never been cited as a basis for upholding an employee competition covenant in South Carolina.

It is not clear what a South Carolina court would do if it faced an employee competition covenant side-by-side with a nondisclosure covenant in an employment agreement. Ironically, a strong argument could be made that the former is unenforceable, but the latter should be upheld. The practical effect on the employer, however, could be the same.

### *3. Other Anomalies*

Employers have also managed to avoid the rigid reasonableness test when other restrictive covenants are at issue. For example, in

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unique assets of his business, a knowledge of which is acquired in confidence during the employment and by reason of it, is recognized everywhere." *Id.* at 159, 29 S.E.2d at 546. In Future Plastics v. Ware Shoals Plastics, 340 F. Supp. 1376 (D.S.C. 1972), the court applied South Carolina law. This is perhaps the seminal case on trade secrets and confidential information protection in this state. *See also* Servo Corp. of Am. v. General Elec. Co., 393 F.2d 551, 555 (4th Cir. 1968) ("The gravamen in a trade secrets case is a breach of confidence, rather than an infringement of a property right.").

117. *See generally* 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* §§ 704-710 (1971). The duty may exist absent an express agreement between the employer and employee if the circumstances are such that the employee is aware of the confidence placed in him by the employer. *See, e.g.*, Wilkes v. Pioneer Am. Ins. Co., 383 F. Supp. 1135 (D.S.C. 1974); Future Plastics v. Ware Shoals Plastics, 340 F. Supp. 1376 (D.S.C. 1972).

118. *See generally* 54 AM. JUR. 2D, *supra* note 117.

119. This point can be analyzed from the perspective that the employer always discloses confidential information to an employee before the employee has met his obligations under the contract. *See* Rubin & Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93 (1981).

*Oxman v. Profit*[120] the court held that an insurance agency contract containing a covenant that the employee would not induce any policyholder of the employer to terminate his insurance policy with the employer was not a covenant not to compete and was enforceable.[121] Likewise, the court in *Dickerson v. People's Life Insurance Co.*[122] held that a similar provision in an insurance agency contract was not a covenant not to compete and was valid because it actually permitted competition. Also, in *Collins Music Co. v. Parent*[123] the court upheld a restrictive covenant in an employment agreement and characterized it as a covenant not to solicit customers of the former employee instead of as an employee competition covenant.[124] The court arguably disregarded the plain meaning of the contract when it found that the restriction was not a covenant not to compete. The court did mention the reasonableness test, but was not compelled to discuss its various elements given the characterization of the covenant as a nonsolicitation covenant.[125]

The holdings in these cases are correct,[126] regardless of the method of analysis employed by the courts.[127] The balancing of interests they represent serves as a useful lesson for re-examining the treatment of employee competition covenants.

Finally, the court has discussed cases in which an employee forfeits pension benefits if he breaches an employee competition cove-

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120. 241 S.C. 28, 126 S.E.2d 852 (1962).

121. *Id.* at 34, 126 S.E.2d at 854.

122. 284 S.C. 356, 326 S.E.2d 423 (Ct. App. 1985).

123. 288 S.C. 91, 340 S.E.2d 794 (Ct. App. 1986).

124. The covenant in *Collins* prohibited the employee from engaging in the business of the employer in " 'any customer location presently served by Employee and/or to be serviced by Employee, which includes as of the date of this agreement, the following locations.' The list attached to the agreement contained the names and addresses of customers serviced by [the employee] in Greenville, Anderson and Spartanburg counties." *Id.* at 92, 340 S.E.2d at 795 (quoting the employment agreement).

125. *Id.* at 93, 340 S.E.2d at 795. Covenants not to solicit customers generally are subject to the same rules as covenants not to compete insofar as the agreement must be limited in duration and contain an express territorial limitation. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham, 658 F.2d 1098 (5th Cir. Unit B Oct. 1981); Marcoin, Inc. v. Waldron, 244 Ga. 169, 259 S.E.2d 433 (1979); Fuller v. Kolb, 238 Ga. 602, 234 S.E.2d 517 (1977).

126. *But see* Sermons v. Caine & Estes Ins. Agency, 275 S.C. 506, 273 S.E.2d 338 (1980) (contract not to solicit customers between an insurance agency and its former agent held unenforceable).

127. The courts did not find that the activities of the two employees in Oxman v. Profit, 241 S.C. 28, 126 S.E.2d 852 (1962), and Dickerson v. People's Life Ins. Co., 284 S.C. 356, 326 S.E.2d 423 (Ct. App. 1985), constituted tortious interference with contractual relations.

nant. In *Rochester Corp. v. Rochester*[128] the court held that such contracts were not subject to the same considerations of public policy as similar restraints in employment agreements.[129] In *Almers v. South Carolina National Bank*,[130] however, the court held that the reasonableness test should be applied even when the only penalty for breach of the covenant was forfeiture of pension benefits.[131]

*Almers* illustrates the supreme court's reluctance to depart from the reasonableness test, even when public policy against restraint of trade is not a prominent issue. None of the decisions in the above cases foreclose the employee's ability to earn a livelihood. In light of these cases, one can only ask—is the reasonableness test outmoded and inhibiting?

## IV. RECOMMENDATION FOR CHANGE

Courts in South Carolina have created a common-law based system to analyze employee competition covenants that neither honors fundamental contract law principles nor adequately addresses the metamorphosis of the relationship between employers and employees. The consequences of adopting and rigidly observing this formalistic approach are that the courts are fettered in their efforts to do real justice and lawyers are left in a state of confusion when drafting protections from competition for their business clients. This may do more harm than good for the hapless employee because lawyers believe they can, with impunity, restrict employees from competing with their former employer even though a court would hold the contract unenforceable. Undoubtedly, this leads to continued overreaching by employers; we can only speculate how many former employees have left their chosen trade because they assumed the contract they signed could be enforced against them. A fresh approach to this area will lend harmony and add predictability to a rapidly evolving body of law in South Carolina and, at the same time, benefit employees and employers alike.

Paradoxically, this new approach seeks to obviate, or at least subordinate, much of the reasonableness test with simple contract analysis. The common-law support for that approach ironically is not a

128. 450 F.2d 118 (4th Cir. 1971).

129. *Id.* at 122.

130. 265 S.C. 48, 217 S.E.2d 135 (1975) (covenant must contain reasonable time and geographic limitations).

131. *Id.* at 56, 217 S.E.2d at 139. The dissent in *Almers* argued that pension plan forfeiture cases should be distinguished from other employee competition covenant cases because the employee can find another job. *Id.* at 62, 217 S.E.2d at 142. A similar result would follow if a liquidated damages provision were the sole penalty for a violation of a covenant not to compete. No cases exist in which the issue was litigated.

case in the twentieth century, but one in the nineteenth century. In *Printing & Numerical Registering Co. v. Sampson*[132] Justice Jessel extolled the "paramount" public policy to consider—freedom to contract.[133] Notably, the court did not jettison an investigation of reasonableness, but only placed it in proper perspective. Fundamental fairness and reasonableness have their place in this area of law, but they are not of singular importance nor are they most effectively determined by application of the reasonableness test.

When the court addresses a covenant not to compete it should first ask: Does a binding contract exist? With respect to agreements containing employee competition covenants, the elements that must be examined are a meeting of the minds, a writing,[134] and sufficient consideration. Although it represents a departure from traditional contract law, the consideration given should be both adequate and sufficient[135] because this is the courts' most defensible basis to preserve an unassailable feature of public policy: freedom of contract must be honored only as between truly free men. Free and reasonable men should be left, however, to bargain away their economic freedom if they choose.[136]

It appears that the courts strike down employee competition covenants based on complicated "balancing of hardships" tests or "public interest analyses" when fundamental contract analysis would save time and effort and yield similar results. For example, if a proposed employee competition covenant is not supported by adequate consideration, it should not be enforced. Public policy is preserved in this approach, but complicated incantations about that policy are avoided.

Under the reasonableness test, perhaps coincidentally, but perhaps by default, an examination of consideration is undertaken last. It should be examined first. This threshold examination of consideration and other fundamental contract elements would likewise allow courts a tenable basis to strike a covenant: contracts entered into under duress are voidable by the aggrieved party. Certainly, such reductionism would have allowed courts in many instances to summarily dismiss an

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132. 19 L.R.-Eq. 462 (1875).

133. *Id.* at 465; *see supra* notes 21-24 and accompanying text.

134. No South Carolina case or statute requires that an employee competition clause be in writing to be enforceable, but that requirement seems to be presumed by lawyers and judges. At least, no reported decision in South Carolina has ever dealt with an unwritten employee competition covenant; however, these clauses should be written.

135. *See supra* notes 87-103 and accompanying text.

136. The freedom to contract includes the freedom to make a bad deal or not to deal at all. *But see* Allen v. Michigan Bell Tel. Co., 18 Mich. App. 632, 637, 171 N.W.2d 689, 692 (1969) ("Implicit in the principle of freedom of contract is the concept that at the time of contracting each party has a realistic alternative to acceptance of the terms offered.").

action by an employer without ever having to engage the exhausting reasonableness test.

If the employee competition covenant survives simple contract analysis, then, but only then, should the court examine the numerous societal and economic factors that have previously been dissected and grouped into the first four elements of the reasonableness test. However, our proposed new framework for analysis would not utilize those elements as such. Rather, it would call upon the court to examine the public policy features those elements should seek to protect. For example, the first element of the reasonableness test, protecting the legitimate interests of the employer, recognizes a public policy mandate that employers be afforded the means to protect their goodwill, their investments in human capital, and their intangible property rights. Many times this protection can be accomplished only by restricting a former employee's ability to compete. Obviously, when the employer's interests are given credence, the sale-of-business noncompetition cases, in which business purchasers are recognized to have a legitimate right to protect the goodwill of the business they are purchasing, begin to look more apposite. We believe this approach would leave intact many, if not most, decided cases.[137]

A fundamental feature of this simple two-part analysis, if the contract is *prima facie* enforceable, would still require judicial discretion to determine reasonableness and to weigh public policy concerns. Admittedly, it is difficult to reconcile allowing a judicial inquiry into reasonableness with the freedom of contract principle because if the parties have made an enforceable contract, technically it should be upheld as agreed. But perhaps the inconsistency may be resolved by limiting the reasonableness inquiry to the question of remedies. For example, in determining the remedy available to an employer whose former employee has breached an otherwise enforceable employee competition covenant, the judge could tailor an injunction to reflect his determination of the reasonableness of the covenant or simply award damages. The award of damages would not necessarily inhibit the former employee's ability to earn a livelihood, but would penalize him for the breach.

Likewise, the courts could make more liberal use of the blue pencil rule, although careless drafting could result from a court's holding that covenants can be judicially reduced in time, scope, or territory. It should be made clear that only *otherwise enforceable* covenants will be candidates for blue pencil treatment.

The use of the reasonableness test as a remedy-oriented analytical

137. Very few previously decided cases actually reached an incorrect or unjust result; rather, they left no trail for later decisions to follow.

tool only after the covenant has passed muster under the fundamental contract analysis would harmonize employee competition covenant cases with other cases dealing with postemployment restraints. These other cases, with a few limited exceptions,[138] already follow this approach. Thus, potential inconsistencies, such as when a nondisclosure covenant is enforced although an employee competition covenant in the same document is not, would be avoided. Apparent inconsistencies, such as between sale of business noncompetition cases and employee competition cases, could be explained easily based on the adequacy of consideration.

## V. CONCLUSION

Clearly, the law of employee competition covenants calls out for judicial re-examination. Unlike many areas of law, employee competition covenant law is used, studied, and relied on every day by litigators and business lawyers. As it currently exists, however, this jurisprudence does not yield useful rules. A return to a simple and logical approach would serve public policy and generate modern, yet historically consistent, tools for analysis.

138. The pension plan forfeiture cases are one example. *See supra* notes 129-33 and accompanying text.